Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1994

JOSEPH W. SMOLLEN, III,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a government employee who is sent out of town by his employer for business reasons is considered to be within the scope of his employment for purposes of the Federal Employees Liability Reform & Tort Compensation Act ("FELRTCA"), 28 U.S.C. § 2679(b), (d) during the duration of that trip although the employee mingles personal matters with the business of his employer, and whether state or federal law applies to that determination.

PARTIES TO THE PROCEEDINGS

Joseph W. Smollen, the petitioner herein, and the respondent United States of America are the parties to this proceeding.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reproduced in the appendix at 1a-13a. The unreported decision of the United States District Court for the Southern District of Texas is reproduced in the appendix at 15a-22a.

JURISDICTION

The judgment of the Court of Appeals was entered on January 11, 1995. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

28 U.S.C. § 2679 provides in relevant part:

> **Exclusiveness of remedy**
>
> (b)(1) The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred.
>
> * * *
>
> (d)(3) In the event that the Attorney General has refused to certify scope of office or employment under this section, the employee may at any time before trial petition the court to find and certify that the employee was acting within the scope of his office or employment. Upon

such certification by the court, such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. A copy of the petition shall be served upon the United States in accordance with the provisions of Rule 4(d)(4) of the Federal Rules of Civil Procedure. In the event the petition is filed in a civil action or proceeding pending in a State court, the action or proceeding may be removed without bond by the Attorney General to the district court of the United States for the district and division embracing the place in which it is pending. If, in considering the petition, the district court determines that the employee was not acting within the scope of his office or employment, the action or proceeding shall be remanded to the State court.

STATEMENT OF THE CASE

In its decision in this case, the court of appeals declined to apply federal law to the determination of whether a government employee was in the scope of employment for purposes of the Federal Employees Liability Reform & Tort Compensation Act, 28 U.S.C. § 2679 *et seq.* ("FELRTCA"). The court of appeals erred because the language of this statute does not expressly indicate whether state or federal law applies to this determination. 28 U.S.C. § 2679(d)(3). In fact, the court of appeals even acknowledged that the statute "does not indicate whether federal or state law governs" (4a).

Most courts of other jurisdictions have applied state law in making the scope of employment determination. As a result, the application of differing state laws on the issue has necessarily lead to inconsistent results among federal courts. In fact, courts of other jurisdictions have concluded based upon facts precisely similar to those presented in this case that an employee was in the scope of employment. Regardless, applying either state or federal law, the undisputed facts of this case compel the conclusion that Mr. Smollen was in the scope of his employment in this case. The court of appeals' decision is directly at odds with the opinion in *Garcia v. United States*, 799 F. Supp. 674 (W.D. Tex. 1992), *aff'd*, 22 F.3d 609 (5th Cir. 1994), *reh'g en banc granted*, 22 F.3d 612 (5th Cir. 1994).

1. ***Facts and Procedural Background.***

Mr. Smollen is employed with the United States Department of Energy (hereafter "DOE") in New Orleans, Louisiana. He has been employed with the DOE for approximately fifteen years and has worked for the government for thirty-two years (2a). He began work as a systems engineer with the DOE in the Strategic Petroleum Reserve in May of 1978 (17a).

As a systems engineer with the Strategic Petroleum Reserve, Mr. Smollen initiates, directs, and coordinates special engineering studies to solve problems associated with fresh water sources, waste treatment disposal, and

other aspects of storage including petroleum storage systems. (A7, p. 1)[1] The mission of the Strategic Petroleum Reserve is to store oil in salt domes to remove in the case of a national emergency. Mr. Smollen is routinely required to examine existing sites and facilities and to recommend changes. He regularly performs studies to measure the oil requirements of national refineries against government facilities and assesses future storage sites. (A7, p. 2). As his job involves his evaluation of storage facilities throughout the United States, he is occasionally required to travel to fulfill these obligations. (A7, p. 5).

In February of 1990, Mr. Smollen began work on a project called the "Sulfur Mines 2-4-5 Gas-In-Oil Project." The purpose of the project was to determine the amount of gas in oil under pressure in underground storage facilities (2a). The government was having problems transferring oil stored underground to surface facilities because of the possibility of an explosion when the pressure is released. Pursuant to his work on this project, Mr. Smollen was ordered by the DOE to travel to Houston, Texas to oversee a sampling project from the Sulphur Mines storage site at Southern Petroleum Labs (2a). It is undisputed that Mr. Smollen was sent to Houston at the direction of the government in furtherance of government business. It is further undisputed that Mr. Smollen would not have been in Houston, Texas except for the business purpose of his employer (2a).

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[1] References beginning with "A" refer to petitioner's Record Appendix filed in the court of appeals.

In accordance with government policy, Mr. Smollen obtained a travel order requiring him to travel to Houston to conduct his business (2a). The travel order, an administrative document, also permitted him to expend government funds in pursuit of his business for which he would later be reimbursed. (A9). Specifically, Mr. Smollen was to be reimbursed by the government for food, his rental car, motel, and telephone calls. The travel order and rental car were approved by his supervisor, Mr. Ernest Chapple. (A9). Mr. Smollen's travel arrangements were made by the DOE and Southern Petroleum Labs (17a).

Mr. Smollen arrived in Houston on May 1, 1990 at approximately 4:00 p.m. (17a). He rented a car and then proceeded directly to Southern Petroleum Labs (2a). There, he monitored tests, took photographs and notes and made some technical evaluations. Mr. Smollen then telephoned his brother-in-law, Frank Newman (hereafter "Newman"), an engineer with the National Aeronautics and Space Administration ("NASA"), who lives in the Houston area. Mr. Smollen then arranged to meet with Newman at his home (2a).

Mr. Smollen left the lab at approximately 6:30 p.m. and drove approximately twenty-five miles to League City, Texas, where Newman resides. Mr. Smollen arrived at Newman's house sometime between 7:15 and 7:30 p.m. (18a). Upon his arrival, they ate dinner and each had a drink. They spoke very lightly about family matters. After dinner, Mr. Smollen had another drink (3a). He then pulled out his briefcase and the two men began a technical business discussion.

Mr. Smollen showed Newman some gas chromatography results and measurements concerning the amounts of gases that "boil off" by their progressive temperatures. Mr. Smollen also showed Newman various charts and graphs (3a). Newman gave Mr. Smollen recommendations on how to organize the project and how to organize an agenda for a presentation he would give the following week. Mr. Smollen took notes during their discussion (3a).

After their discussion of the project, they watched television and Mr. Smollen gave Newman a recipe (3a). Mr. Smollen left Newman's home at approximately 12:00 a.m. to return to the motel where he was staying. Mr. Smollen took one drink with him when he left Newman's house which he planned to consume when he reached his destination (3a). Because he had consumed only two alcoholic beverages over almost a five hour period, Mr. Smollen was not intoxicated. While returning to his motel from Newman's home, Mr. Smollen was involved in an automobile-pedestrian accident at approximately 12:30 a.m. (18a). At the time of the accident, Mr. Smollen was driving the government rented vehicle (18a).

Mr. Smollen requested certification by the Attorney General that he was acting in the scope of his office at the time of the accident in accordance with FELRTCA. Because the Attorney General refused to certify scope of employment, Mr. Smollen filed a declaratory judgment action against the United States in federal court requesting certification. The federal district court then conducted a bench trial on April 1, 1993, to determine whether Mr. Smollen was acting in the course and scope of his employment at the time of the accident.

The district court concluded that Mr. Smollen was not acting in the course and scope of his employment when he was involved in the May 1990 accident (3a). The United States then submitted proposed findings of fact and conclusions of law which were adopted in their entirety by the court on November 30, 1993 (16a-22a). On December 13, 1993, the court entered a final judgment that Mr. Smollen was not acting in the course and scope of his employment at the time of the May 2, 1990 accident (15a).

On December 23, 1993, Mr. Smollen filed an amended Motion to Amend and to Make Additional Findings of Fact and Conclusions of Law. Mr. Smollen also filed a Motion for New Trial on that date. Both these motions were denied by the court on January 18, 1994.

2. *Decision of the Court of Appeals.*

The court of appeals affirmed the judgment of the trial court in an opinion issued on January 11, 1995. Although the court recognized that FELRTCA does not indicate whether federal or state law applies to the scope of employment issue, the court declined to consider the application of federal common law on the basis that this argument was raised for the first time in the court of appeals (6a). The court found that there was no showing of "manifest injustice" to permit the court's consideration of that issue, although the court conceded that the issue has never been addressed by the Fifth Circuit (6a).

The court of appeals then concluded that there was no clear error in the district court's factual findings (7a). The court stated that the "course and scope" of an

employee is a fact issue subject to the clearly erroneous standard of review (8a-9a). The court based its decision on the fact that the cases relied upon by Mr. Smollen in support of his argument that he was in the scope of his employment at the time of his accident all involved situations where the issue was decided by a jury (9a). The court also noted that "none of these cases holds that an employee is within the scope of his employment throughout his travel to another city for business purposes" (10a). The court therefore concluded that there was no error in the district court's determination that Mr. Smollen was on a personal mission at the time of his accident and was therefore outside the scope of his employment (10a).

REASONS FOR GRANTING THE WRIT

Federal courts have held that state law is applicable to the scope of employment determination for purposes of the Federal Tort Claims Act, 28 U.S.C. § 1346(b) (FTCA). However, the issue of whether federal or state law governs the scope of employment determination for purposes of FELRTCA has never before been decided by the Fifth Circuit or explicitly addressed by this Court, despite the fact that the application of state law has lead to wholly inconsistent results among federal courts. In fact, the ruling of the court of appeals that state law applies is inconsistent with the language of FELRTCA as well as the decision of the only Texas court to address the issue.

Regardless, even if the court was correct in that state law applies to the scope of employment issue pursuant to FELRTCA, the court's decision was still in error under bedrock principles of Texas law. First, the court concluded that the scope of employment issue is a question of fact, directly contrary to the opinions of many Texas courts where the issue was decided as a matter of law. Second, Texas courts have routinely found that, under similar facts, an employee was on a "special mission" for his employer and within the scope of employment as a matter of law. Third, the court of appeals completely ignored the decision in *Garcia* which involved precisely analogous facts in deciding that Mr. Smollen was not in the course and scope of employment at the time of his accident.

A. Review Should be Granted Because the Ruling of the Court of Appeals is Inconsistent with (1) the Language of the Federal Employees Liability Reform & Tort Compensation Act, and (2) the Decisions of Other Federal Courts and Texas State Courts.

1. The Language of the Federal Employees Liability Reform & Tort Compensation Act

FELRTCA was enacted to insulate United States employees from personal liability for injuries caused by negligent acts in the operation of motor vehicles while acting within the scope of employment. *United States v. Smith*, 499 U.S. 160, 163 (1991); *see*, 28 U.S.C. § 2679(b),

(d).[2] Pursuant to the Act, the government must be certified as a party defendant when the attorney general certifies that the defendant employee was acting within the scope of employment. *Johnson v. Carter*, 983 F.2d 1316, 1320-21 (4th Cir. 1993). However, in the event that the attorney general refuses to certify scope of office or employment under the Act, the employee may petition the court to find and certify that the employee was acting within the scope of his office or employment. 28 U.S.C. § 2679(d)(3).

In a recent case, the United States District Court for the Western District of Texas discussed at length the issue of whether Texas law or federal common law should apply in determining whether an employee is acting within the scope of his employment pursuant to FELRTCA and the FTCA. In *Garcia v. United States*, 799 F. Supp. 674, 676-81 (W.D. Tex. 1992), *aff'd*, 22 F.3d 609 (1994), *reh'g en banc granted*, 22 F.3d 612 (1994), the court concluded that federal common law should apply to determine if an employee is within the scope of employment under the FTCA and FELRTCA[3] in furtherance of a more uniform approach among federal courts. The court noted that recent decisions of the Supreme Court and of

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[2] FELRTCA amended several provisions of the FTCA, 28 U.S.C. § 1346(b), 2671, *et seq.*, which waived the United States sovereign immunity with respect to state tort actions against it for injuries caused by the negligence of its employees acting within the scope of employment, but excepted from that limited waiver of immunity all claims based on the discretionary acts or omissions of federal employees. 28 U.S.C. § 2680(a).

[3] The court in *Garcia* refers to FELRTCA as the "Westfall Act."

the Fifth Circuit have emphasized that federal statutes are generally intended to have uniform nationwide application and these courts have looked to common law rather than to the law of any particular state in determining the meaning of language in other statutes. *Id.* at 677. The court also stated that:

> Since the concept of course or scope of employment is enmeshed within the employee-employer relationship and the same general principles of agency law, federal courts should also apply and establish uniform and consistent legal standards to determine whether a federal employee was acting within the scope of employment. The application of such a rule would establish a more consistent and comprehensible set of guidelines for all parties involved in these actions. This division between the applicability of federal law to determine the scope of employment and of the "law of the place" to determine the liability for the particular conduct is much more consistent with the goals and purposes of the FTCA and [FELRTCA]. *Id.* at 678.

The court then went on to discuss that the Act nowhere expressly states that the "scope of employment" should be determined according to the law of the state in which the conduct occurred. *Id.* Although the Act references § 1346(b) of the FTCA which also does not define scope of employment, that statute implicates state law only to determine liability for the act or omission. *Id.* In other words, if the "scope of employment" language were omitted, then the language referring to the application of state law would also apply to the course of employment issue. By expressly including the scope of employment

language in this provision, Congress has indicated that this element should be determined separately and distinctly from the law of the place. *Id.*

Additionally, FELRTCA does not expressly limit the resolution of the scope of employment issue to the law of the state where the accident occurred. *Id.* at 679. The statutory sections governing the procedures for review of the scope of employment issue, sections 2679 and 2675, do not limit the scope of employment issue to the law of the place. The court then concluded that

> [b]ecause Congress did not specify or define the method to construe the scope of employment of a federal employee; because the FTCA is logically presumed to have a consistent nationwide application; and, because the goal of effectively indemnifying federal employees acting within the scope of their employment should be uniform and consistent: the applicable law should be the general common law of agency, and not the law of the state where the conduct occurred. *Id.* at 679-80.

In closing, the court noted that FELRTCA itself supports the application of general common law to determine the scope of employment issue. The court stated:

> Federal employees, especially federal agents, might travel extensively. They often travel to many different states. If based exclusively upon the law of the state in which the harm occurred, the federal courts could reach contrary conclusions regarding the scope of employment issue of a federal employee under similar facts and circumstances. These acts were designed to insulate federal employees acting within the scope of their employment from tort

> liability, as well as provide a remedy for harmed victims . . . By applying the distinction discussed above, the federal courts could more consistently promote both goals of these acts . . . This distinction between the applicability of state law and federal law is the most consistent, efficient, and pragmatic construction of the language and purpose of the FTCA. *Id.* at 680.

Consistent with the court's opinion in *Garcia*, Mr. Smollen believes that the applicable law in the present case should be the federal common law of agency. However, there are other jurisdictions which have made the scope of employment determination according to the *respondeat superior* rules of the state in which the alleged tort occurred. *See, Jamison v. Wiley*, 14 F.3d 222, 237 (4th Cir. 1994); *Woods v. McGuire*, 954 F.2d 388, 390 (6th Cir. 1992); *Nadler v. Mann*, 951 F.2d 301, 305 (11th Cir. 1992).[4] Nevertheless, the express language of the statute compels a finding by this Court that federal law applies to the scope of employment issue.

2. Conflicting Case law

a. Federal cases

The application of state law to the scope of employment issue has inevitably lead to inconsistent results

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[4] As the court noted in *Garcia*, this court in *Williams v. United States*, 350 U.S. 857 (1955), stated in a two sentence per curiam opinion that the issue of whether a soldier in the United States army was acting in the line of duty was controlled by state law. 799 F. Supp. at 677 fn. 7. Most jurisdictions have relied upon *Williams* in reaching the decision that state law applies.

among federal courts. Under similar facts, other jurisdictions have found that an employee was in the scope of employment in direct contrast to the present case. *See, Ashworth v. United States*, 772 F. Supp. 1268, 1271-72 (S.D. Fla. 1991) (coast guard seaman traveling to new duty station was in scope of employment when involved in auto accident although he was on leave on the day of the accident and made several stops for personal reasons); *Fitzpatrick v. United States*, 754 F. Supp. 1023, 1035 (D. Del. 1991) (army sergeant who was regularly required to travel to assist in training of national guard members was on "special mission" from time he left fort through weekend of training maneuvers in Delaware). Since federal employees are routinely required to travel, this result is in indirect contravention to the purpose of the statute which is to protect government employees.

In an analogous context, this Court in *Cunningham v. Neagle*, 135 U.S. 1 (1890), found that Justice Stephen Field of the Supreme Court in traveling to a circuit court was acting in the discharge of his duties. During his trip, an assailant attempted to kill Justice Field. The court held that Justice Field was engaged in the discharge of his official duties when the deputy marshall who was protecting and guarding the Justice at the time killed the assailant. *Id.* at 69. *See also, Clifton v. Cox*, 549 F.2d 722 (9th Cir. 1977); *Commonwealth of Kentucky v. Long*, 837 F.2d 727 (6th Cir. 1988).

The decision of the court of appeals is also in direct conflict with the decision in *Garcia* which involved almost identical facts. In *Garcia*, the court alternatively applied both federal and state law in reaching the decision that under either law, a government employee was within the

scope of employment. 799 F. Supp. at 682. The government employee in *Garcia* was an agent for the Environmental Protection Agency who was based and resided in Dallas. *Id.* at 675. His superiors ordered him to proceed to Austin to participate in a federal criminal investigation in the Austin area. The agent had been issued an official governmental travel authorization, as well as a *per diem* reimbursement for his expenses including gasoline and hotel accommodations. He was also assigned a government-owned vehicle for the duration of the trip. Late one evening after investigating a particular site in the Austin area, the agent stopped at a local restaurant and bar. *Id.* While there, the agent did not eat but did consume alcoholic beverages. Upon leaving the restaurant, he drove to a nearby pharmacy, and became nauseated in the parking lot. He then drove a short distance further and collided with the plaintiff's automobile. The agent was arrested and charged with driving while intoxicated. *Id.* at 675-76.

Applying federal common law, the court in *Garcia* concluded that the foreseeability of the accident would have been reasonable to the employer in that case. "Whenever an employee is on a business trip and entrusted with a vehicle of the owner, the employer must reasonably expect that an accident could occur." *Id.* at 681. Even if the employer might not expect the employee to become intoxicated, such an event is not unforeseeable. *Id.* The court also found that under state law, the agent would not have been in Austin except for his special assignment. *Id.* at 683. Therefore, the court concluded that under either state or federal law, "the agent was on a special mission, at all times subject to and under the direction of the Government." *Id.* at 682.

As in *Garcia*, the facts of this case compel a conclusion that Mr. Smollen was acting within the scope of his employment at the time of his accident. It is undisputed that Mr. Smollen was sent to the city of Houston at the direction of his employer, the Department of Energy (2a). Mr. Smollen was sent to Houston in order to oversee testing procedures in accordance with a government project (2a). He was to be reimbursed for his travel expenses, including a rental car (2a). The government and Southern Petroleum Labs made all his travel arrangements (17a). It is clear that Mr. Smollen would not have even been in Houston except for the government business.

Indeed, the facts of this case militate even more strongly than the facts of the *Garcia* case in favor of a finding by this Court that Mr. Smollen was in the scope of employment. In *Garcia*, the agent left the investigation site in a government vehicle to find a restaurant *only* for personal reasons. It was after his visit to the restaurant where he became intoxicated that he drove in search of a pharmacy, also for purely personal reasons; the accident occurred when he then attempted to return to his hotel. 799 F. Supp. at 675. Still, the court found that the agent was in the course and scope of employment. Here, Mr. Smollen combined both personal and business interests when consulting with Newman (2a-3a). Consequently, in returning to his motel from his meeting with Newman, Mr. Smollen was in the scope of his government employment.

b. State cases

Regardless, even assuming that state law is the applicable law, the court of appeals' decision is also contrary to settled Texas jurisprudence. The test in Texas for determining a master's liability for the negligent acts of his servant is "whether on the occasion in question, the master has the right and power to direct and control the servant in the performance of the causal act or omission at the very instance of its occurrence." *Wilson v. H.E. Butt Grocery Co.*, 758 S.W.2d 904, 907 (Tex. App. – Corpus Christi 1988, no writ). The Texas Supreme Court has also enumerated certain factors to be considered in determining whether an employee is in the course and scope of employment. To show the requisite degree of control, the act must be done: (1) within the general authority of the master; (2) in furtherance of the master's business; and (3) for the accomplishment of the object for which the servant is employed. *Robertson Tank Lines, Inc. v. Van Cleave*, 468 S.W.2d 354, 357 (Tex. 1971).

It is the general rule that use of public streets or highways in going to or returning from one's place of employment is not within the scope of one's employment. *J & C Drilling Co. v. Salaiz*, 866 S.W.2d 632, 636 (Tex. App. – San Antonio 1993, no writ). However, an exception to the general rule exists where an employee has undertaken a special mission at the direction of his employer or is otherwise performing a service in furtherance of the employer's business with the express or implied approval of the employer. *Chevron, U.S.A., Inc. v. Lee*, 847 S.W.2d 354, 356 (Tex. App. – El Paso 1993, no writ). Inherent in any applicable definition of "special mission" is the principle that an employee must be under the control of the

employer or acting in furtherance of the employer's business. *Id.* at 356.

In reaching its decision in this case, the court of appeals found that the scope of employment issue is a fact issue, subject to the "clearly erroneous" standard (8a-10a). Contrary to this conclusion, the determination of whether an employee's actions are within the scope of employment for purposes of the Act involves a question of law as well as fact. *S.J. & W. Ranch, Inc. v. Lehtinen*, 913 F.2d 1538, 1542 (11th Cir. 1990). Where there are facts in dispute, the standard of review as to those factual findings is whether they are clearly erroneous. *See, McCluggage v. United States*, 392 F.2d 395, 397 (6th Cir. 1968); *see also*, FED. R. CIV. P. 52(a). But where, as here, the facts are essentially undisputed, the "determination of the scope of employment is a question of law, reviewable *de novo*." *Washington v. United States*, 868 F.2d 332, 334 (9th Cir. 1989), *cert. denied*, 493 U.S. 992 (1989). In fact, Texas courts have routinely decided the issue as a matter of law. *See, Bordwine v. Texas Employers' Ins. Ass'n*, 761 S.W.2d 117, 120 (Tex. App. – Houston [1st Dist.] 1988, writ denied); *Aetna Life Ins. Co. v. Woods*, 449 S.W.2d 86, 89 (Tex. Civ. App. – Fort Worth 1969, writ ref'd n.r.e.).

Texas courts have often held that out of town trips at the direction of an employer constitutes a "special mission." In *Chevron, U.S.A., Inc. v. Lee, Inc., supra*, a Chevron employee was required by his employer to attend a seminar in Midland, Texas approximately 60 miles from his residence. The employee's expenses of travel were paid by his employer. While on his way to the seminar, the employee was involved in an automobile accident. The

court found that "while the mode of travel was not dictated by Chevron, the requirement of travel was." 847 S.W.2d at 356. Therefore, the court held that the employee was on a "special mission" and in the scope of his employment.

Additionally, an employer is still responsible for the acts of the employee even if there is a mingling of the employee's personal business and the employer's business. *Josey-Miller Co. v. Sheppard*, 357 S.W.2d 488, 489 (Tex. Civ. App. – Beaumont 1962, no writ). For example, *Dictaphone Corp. v. Torrealba*, 520 S.W.2d 869 (Tex. Civ. App. – Houston [14th Dist.] 1975, writ ref'd n.r.e.), involved a situation where a traveling salesman had an accident while leaving town for a business appointment. Although his employer had the right to control the details of his work, he was given wide discretion as to when and where he went. In that case, the defendant-employer argued that because the salesman had taken a detour to cash a check, he was outside the course and scope of his employment. *Id.* at 871. The court of appeals disagreed and held that an employee's arrangement of the performance of his duties in a manner consistent with this personal convenience does not take him out of the scope of his employment. *Id.* at 872.

Best Steel Buildings, Inc. v. Hardin, 553 S.W.2d 122 (Tex. Civ. App. – Tyler 1977, writ ref'd n.r.e.), is also controlling here. In that case, the court held that employees working in Austin and returning from a trip to Houston to pick up supplies were in the course and scope of their employment because they were on a special mission for their employer. *Id.* at 128. The court also rejected the argument that because the employees attended to

personal business including visiting family members, they were not in the course and scope of employment. The court reasoned that "the fact that the preponderate motive of a servant is to benefit himself or a third person does not prevent the act from being within the scope of employment." *Id.* If the employer's business actuates the servant to any extent, the employer is still subject to liability if the act is otherwise within the service of his employer. *Id.*

In short, the application of Texas law to the facts of this case necessitates a conclusion by this Court that Mr. Smollen was in the course and scope of his employment when the accident occurred. Mr. Smollen was on a "special mission" for the government throughout the entire two days he spent in Houston. At the time of the collision, he was returning to his motel from a meeting relating to the purpose for which he was employed. The fact that he may also have mingled his personal business with that of his employer does not change this result. Consequently, this Court should grant the petition for writ of certiorari in this case.

B. Review Should Be Granted Because of the Manifest Importance of the Court of Appeals' Ruling

In Petitioner's view, the court of appeals paid too little attention to whether state or federal law should apply to the scope of employment issue under FELRTCA. The court declined to explicitly address the issue on the basis that it was raised for the first time on appeal and there was no showing of "manifest injustice" (4a-6a). However, it is not surprising that the issue was not raised

until the appeal of the case since the Fifth Circuit has never addressed the issue, most other circuits hold that state law applies, and the first Texas opinion to raise the issue is fairly recent. Additionally, the fact that courts are inconsistent in their resolution of the course and scope issue demonstrates "manifest injustice." In fact, the result in this case may have been different if Mr. Smollen's accident occurred in another state.

In any event, the court of appeals' decision that Mr. Smollen was not in the course and scope of employment at the time of his accident under Texas law is also in error. This decision displaces virtually all state law that a party can combine business and personal matters and still be considered to be in the course and scope of employment. *See, Sheppard,* 357 S.W.2d at 449. The opinion is also contrary to those Texas cases holding that the issue can be decided as a matter of law. *See, Bordwine,* 761 S.W.2d at 120.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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Joseph W. Smollen, III

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-20122
(Summary Calendar)

JOSEPH W. SMOLLEN, III,

Plaintiff-Appellant,

versus

UNITED STATES OF AMERICA,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Texas
(CA-H-92-1232)

(Filed Jan. 11, 1995)

Before DUHÉ, WIENER and STEWART, Circuit Judges.

PER CURIAM:*

Plaintiff, Joseph W. Smollen, appeals the district court's determination that he was not acting within the scope of his federal employment when he was involved in an automobile accident. Finding no error, we affirm.

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*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

FACTS

Joseph W. Smollen, III, ("Smollen"), a systems engineer at the Strategic Petroleum Reserve Management Office with the Department of Energy ("DOE"), was involved in an automobile/pedestrian accident during a DOE authorized trip to Houston, Texas. After the Attorney General refused to certify that Smollen was acting within the scope of his employment at the time of the accident, Smollen filed this complaint for declaratory relief under 28 U.S.C. § 2679(d)(3) requesting that the district court find and certify that he was an employee acting within the scope of his employment at the time of an accident.

Evidence of the following was presented during a bench trial: Smollen is an expert in systems engineering, with expertise in modern civil, mechanical, electrical, and petroleum engineering design concepts. Moreover, he is an expert in making presentations on technical and non-technical matters. DOE authorized Smollen to travel to Houston, Texas, to review and oversee crude oil testing at Southern Petroleum Labs in an effort to devise a better way to measure the amount of gas in oil under high pressure. Smollen's travel authorization permitted Smollen to rent a car while in Houston. Smollen rented the car upon his arrival and drove to the lab to monitor lab tests for several hours. He then drove to his hotel and called his brother-in-law, Frank Newman ("Newman"). Smollen invited Newman to dinner; Newman declined, but suggested that Smollen drive to Newman's home, approximately 25 miles from his hotel, for dinner. Smollen agreed and arrived at Newman's home around 7:30 p.m. Although Smollen usually contacted Newman

when he visited and they routinely discussed their work when they got together, the dinner was not arranged before Smollen's arrival in Houston. While in Newman's home, Smollen ate dinner, had one drink before dinner and one drink after dinner, watched television, and talked about the gas-in-oil project, recipes, and family matters. During their conversation about the gas-in-oil project, Smollen showed Newman some charts and took notes. Newman observed that Smollen had talked for a while and had not yet clearly defined the problem. Newman's main suggestion was that Smollen should state his problem and say why it is a problem. Newman has no knowledge, experience, or training in the petrochemical industry, and he did not understand the charts or the technical aspects of the problem. Smollen left Newman's home around midnight with an alcoholic beverage to drink after he returned to his hotel. While en route to his hotel in the rental car, Smollen was involved in an automobile/pedestrian accident.

The district court concluded that Smollen was outside the scope of employment when the accident occurred. After the court issued its decision, Smollen timely moved for a new trial on the basis that he was told by a Harris County assistant district attorney that government agents seized his briefcase from the Harris County police department because it contained "government information." The court denied Smollen's motion. Smollen appeals, asserting that the district court erred when it (1) determined that he was outside the scope of his employment, (2) refused to admit evidence of a DOE memorandum that allegedly concluded that Smollen was

within the scope of his employment when the accident occurred, and (3) denied his motion for a new trial.

DISCUSSION

Scope of Employment

Smollen asserts three bases for this court to conclude that the district court erred when it concluded that he was not acting within the scope of his employment at the time of his accident: (1) the court applied the wrong law; (2) the court erroneously failed to find four facts that would have supported the conclusion that he was within the course of his employment, or (3) the court misapplied Texas law to the facts found by the court.

The Federal Employees Liability Reform & Tort Compensation Act ("FELRTCA") amended the Federal Tort Claims Act ("FTCA") to restore immunity to federal employees who perform non discretionary functions. *Pelletier v. Federal Home Loan Bank of San Francisco*, 968 F.2d 865, 875 (9th Cir. 1992). The FELRTCA provides that, if the Attorney General refuses to find and certify that the employee was acting with the scope of his employment, the employee may petition the court to certify the scope of employment. 28 U.S.C. § 2679(d)(3). It does not indicate whether federal or state law governs. Smollen argues for the first time on appeal that the district court should have applied "federal common law", rather than state law, when it determined whether Smollen was within the course of his employment for purposes of the FELRTCA.

It is well established in this Circuit that, absent some manifest injustice, parties are ordinarily bound by the

theory of law they argue in the district court. *American Int'l Trading Corp. v. Petroleos Mexicanos,* 835 F.2d 536, 540 (5th Cir. 1987). However, this Court may consider a choice of law issue raised for the first time on appeal where manifest injustice would result. *Employers Ins. of Wausau v. Occidental Petroleum Corp.,* 978 F.2d 1422, 1430 n.8 (5th Cir. 1992), *cert. denied,* 114 S.Ct. 61, 126 L.Ed.2d 30 (1993). Manifest injustice exists in extreme circumstances and demands more than a different result. *American Int'l Trading Corp.,* 835 F.2d [sic] at 540. "If 'manifest injustice' only meant that application of another jurisdiction's law would yield a different result, then choice of law issues could always be raised first on appeal." *Id.* Thus, a showing of manifest injustice requires more than a showing that the law of a different forum should be applied.

Smollen contends that, under *Garcia v. United States,* 799 F. Supp. 674, 677-78 (W.D. Tex. 1993), *aff'd on other grounds,* 22 F.3d 609, 610 (5th Cir.), *reh'g en banc granted,* 22 F.3d 612 (5th Cir. 1994), federal law determines whether a federal employee was acting within the scope of his employment for purposes of FELRTCA. Therefore, he asserts, it would be a manifest injustice for the court not to apply federal law. We are not persuaded by Smollen's *Garcia*-based argument. Even if Smollen were correct in his contention that federal common law applies, such fact alone would not constitute manifest injustice. Smollen has not argued or shown more than his assertion that federal law governs. Thus, even if we were to assume, *arguendo,* that federal law should have been applied to this issue, Smollen has not shown manifest injustice. As we stated in *Employers Ins. of Wausau,* 978 F.2d at 1430 n.8, "[b]ecause the choice of law issue was

not raised below, and because we find no manifest injustice in refusing to decide the issue on appeal, we decline to address it." For this reason, we do not address the issue of whether the federal common law, rather than state law, governs the determination of Smollen's scope of employment.[1]

Smollen next contends that even if Texas law controls, the district court erroneously failed to find that: (1) he could consult with anyone who might contribute to the furtherance of government business; (2) Newman was a NASA engineer with a higher official government ranking than Smollen and that his ability to contribute did not depend on an arbitrary description of function; (3) Newman could assist Smollen in preparing for and organizing his presentation; and (4) that there was a mingling of

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[1] We note it is likely that the court below correctly applied state law for purposes of FELRTCA. For this reason, we are not persuaded by Smollen's argument that *Garcia* (which is currently pending *en banc*) requires application of federal common law. Although we have not yet addressed this issue, we have held that state law governs for purposes of the FTCA. *Bettis v. U.S.*, 635 F.2d 1144, 1147 (5th Cir. 1981). Those circuits addressing the issue have concluded that state law governs. *Nasuti v. Scannell*, 906 F.2d 802, 805 n.3 (1st Cir. 1990); *Aliota v. Graham*, 984 F.2d 1350, 1358 (3d Cir.), cert. denied, 114 S.Ct. 68 (1993); *Jamison v. Wiley*, 14 F.3d 222, 237 (4th Cir. 1994); *Arbour v. Jenkins*, 903 F.2d 416, 421-22 (6th Cir. 1990); *Brown v. Armstrong*, 949 F.2d 1007, 1012 & n.7 (8th Cir. 1991); *Pelletier v. Federal Home Loan Bank*, 968 F.2d 865, 876 (9th Cir. 1992); *S.J. & W. Ranch, Inc. v. Lehtinen*, 913 F.2d 1538, 1542, amended, 924 F.2d 1555 (11th Cir. 1990), cert. denied, 112 S.Ct. 62 (1991); cf. *Yalkut v. Gemignani*, 873 F.2d 31, 34 (2d Cir. 1989) and *Sullivan v. Freeman*, 944 F.2d 334, 336 (7th Cir. 1991). *Yalkut* and *Sullivan* suggest, without discussion, that state law governs tort claims under FELRTCA.

personal and professional purposes for the meeting between Newman and Smollen. These contentions are challenges to the district court's factual findings.

We review the district court's findings of fact for clear error. *Southern Pacific Transp. Co. v. Chabert*, 973 F.2d 441, 444 (5th Cir. 1992), *cert. denied*, 113 S.Ct. 1585, 123 L.Ed.2d 152 (1993). Under the clearly erroneous standard, this Court will not set aside the district court's factual findings unless, based upon the entire record, it is " 'left with the definite and firm conviction that a mistake has been committed.' " *Burlington Northern R.R. Co. v. Office of Inspector Gen., R.R. Retirement Bd.*, 983 F.2d 631, 639 (5th Cir. 1993) (quoting *Anderson v. City of Bessemer City*, 470 U.S. 564, 573, 105 S.Ct. 1504, 1511, 84 L. Ed. 2d 518, 528 (1985)).

The district court's factual findings and conclusions of law show that it did consider testimony and other evidence regarding these facts in making its determination that Smollen was outside the scope of his employment. The record supports the district court's factual findings, as well as its conclusion that

> Smollen could not have had a reasonable expectation that Mr. Newman could have offered any assistance to the DOE, which would have included any advice or information that would have assisted the DOE in solving any problem or matter to which it was involved concerning the problem with the gas and the oil under pressure.

There was no clear error in the district court's factual findings.

Smollen next argues that the district court misapplied Texas law. He contends that the appropriate standard of review is de novo because the facts are essentially undisputed. In this circuit, a district court's legal conclusions following a bench trial are subject to plenary review, but its factual findings are subject to the clearly erroneous standard of review. *Southern Pacific Transp. Co.*, 973 F.2d at 444.

Under Texas law, an employee is acting within the scope of his employment if the act (1) falls within the scope of the employee's general authority; (2) furthers the employer's business; and (3) is for the accomplishment of the object for which the employee was hired. *Leadon v. Kimbrough Bros. Lumber Co.*, 484 S.W.2d 567, 569 (Tex. 1972). When an employee undertakes a special mission under his employer's direction or performs a service in furtherance of the employer's business with its express or implied approval, the employee is generally acting within the scope of his employment from the start of the special mission until its completion, absent any deviation for personal reasons. See *Chevron, USA, Inc. v. Lee*, 847 S.W.2d 354, 356 (Tex. Ct. App. 1993). In order to be on a "special mission", an employee must be under the control of the employer or acting in furtherance of the employer's business. *Id.* If found to be on a special mission, the employee will be considered to be generally acting within the scope of his employment from the start of the special mission until its completion, absent any deviation therefrom for personal reasons. *Id.*

Where there is a fact issue as to the "course and scope" of an employee in performing a particular task which may give rise to an issue of liability upon the part

of the master, that issue should be submitted for the jury's determination. *Ryder Truck Rentals v. Latham*, 593 S.W.2d 334, 336-337 (Tx.Ct.App. 1979). Thus, whether or not an employee acted within the scope of his employment is a question for the factfinder. *See also, Blue Steel Bldgs., Inc. v. Hardin*, 553 S.W.2d 122 (Tex. Ct. App. 1977) (scope of employment is a question for the jury); *Dictaphone Corp. v. Torrealba*, 520 S.W.2d 869 (Tex. Ct. App. 1975) (scope of employment question submitted to the jury); *Chevron, USA, Inc.* (scope of employment question submitted to the jury).

Smollen argues that he was on a "special mission" when DOE sent him to Houston in furtherance of its gas-in-oil project and that, as a result, he was within the scope of his employment throughout his stay in Houston, even if he combined business with personal matters when he contacted Newman. Smollen relies upon *Chevron, USA, Inc.* (Employee was on special mission when en route to a mandatory seminar which was for the ultimate benefit of the employer; at the time of the accident, the requirement of travel was dictated by the employer); *Blue Steel Bldgs., Inc.* (Employer sent employee from Austin to Houston to pick up supplies and bring them back to Austin; employee spent the night at his daughter's home near Houston, and left about 5 a.m. to return to Austin; the accident occurred en route back to Austin, and there was "nothing in the record to suggest that at the time of the collision he had undertaken a mission of his own"); and *Dictaphone Corp.* (Employee made several stops while en route from Houston to Bryan for business purposes at time of fatal accident; at time of collision, employee was

going to a Holiday Inn to cash a check to get money to pay his expenses on his trip).

In each of these cases, the jury determined that the employee was in the course and scope of his employment at the time of the accident. However, none of these cases holds that an employee is within the scope of his employment throughout his travel to another city for business purposes. For this reason, we are not persuaded by Smollen's argument regarding these cases.

The district court made the following factual findings: (1) Smollen's job description did not give him an unlimited right to make personal contacts; there should at least be a reasonable expectation that a proposed personal contact would meet or accomplish one of the purposes stated in the job description; (2) on the evening in question Smollen could not have had any reasonable expectation that his contact and consultation with Newman would have provided any information that would assist him in solving any problem or matter involving DOE, including the gas-in-oil project; and (3) the preponderance of the evidence supports the conclusion that Smollen's get-together with Newman was for his own, personal purposes, and not to further the purpose of carrying out DOE's business. Our review of the record reveals no clear error in these factual findings.

Based upon the facts as determined by the district court, we cannot say that the circumstances at the time of Smollen's accident preponderate toward finding that he was on a business "special mission". We find no error in the district court's determination that Smollen was engaged in a personal mission, rather than furthering his

employer's interests, when the accident occurred and that, as a result, he was acting outside the scope of his employment.

Because Smollen was pursuing his own personal mission when the accident occurred rather than furthering his employer's business, it was not error for the court to determine that he was not within the scope of his employment.

MOTION FOR NEW TRIAL

Smollen moved for a new trial on the basis that he discovered, after the district court rendered its decision, that federal agents seized his briefcase from the Harris County police department. He argues that the district court erred when it denied his motion.

In determining whether to grant a new trial on the basis of new evidence, the district court should consider whether the new evidence (1) would likely change the outcome; (2) could have been discovered earlier with due diligence; and (3) would be cumulative or impeaching. *Peteet v. Dow Chem. Co.*, 868 F.2d 1428, 1435 (5th Cir.), *cert. denied*, 493 U.S. 935 (1989). The standard of review is whether the district court's denial was an abuse of its discretion. *Id.*

Smollen contends that the seizure of his briefcase by federal agents indicates that the government believed that he was in the course and scope of his employment when the accident occurred. He contends also that he could not have known about the seizure of the brief case

because "it was solely within the knowledge of the government," and that this information is not cumulative or impeaching because the district court concluded that he was not within the scope of his employment. Finally, Smollen simply states that the district court would most likely have reached a different result with respect to the scope of employment issue.

Nothing suggests that the government's retrieval of the briefcase is relevant. The mere presence of government information in an employee's briefcase, even if established,[2] does not indicate that an employee is acting within the scope of his employment. Accordingly, the government's actions have little, if any, probative value on the issue of whether Smollen was within the scope of his employment when the accident occurred. Moreover, nothing suggests that this evidence would have changed the outcome of the trial. The district court found that Smollen discussed some business with Newman that evening, but the court nevertheless found that the meeting was personal in nature. Given the irrelevance of the evidence and its immateriality, the district court did not abuse its discretion when it denied Smollen's motion for a new trial.

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[2] Based on the testimony, the briefcase likely contained, among other things, the graphs, charts, and other lab results that Smollen testified that he showed Newman. It would not be surprising, then, that the government would want to retrieve these items.

EXCLUSION OF EVIDENCE

Smollen contends that the district court abused its discretion when it excluded evidence that the government destroyed a memorandum prepared by a DOE attorney, which allegedly concluded that Smollen was within the scope of his employment when the accident occurred. Smollen contends that the investigation conducted by the DOE attorney, her conclusion, and the subsequent disappearance of the memorandum are evidence that Smollen was acting within the scope of his employment. He argues that the government should not profit from the memorandum's destruction.

This Court has long held that the admission of evidence rests within the sound discretion of trial court. *Jon-T Chems., Inc. v. Freeport Chem. Co.*, 704 F.2d 1412, 1417 (5th Cir. 1983). Where the DOE has denied certification of the employee's scope of employment, the district court must make an independent determination. 28 U.S.C. § 2679(d)(3). Therefore any conclusion in the DOE memorandum as to whether Smollen was within the scope of his employment is irrelevant. To the extent that the investigation by DOE discovered any relevant factual information, Smollen was free to introduce that information, and he does not contend that he could not do so. Accordingly, the district court did not abuse its discretion when it excluded the testimony regarding the memorandum.

CONCLUSION

For the foregoing reasons, the judgment of the district court is AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-20122
Summary Calendar

D.C. Docket No. CA-H-92-1232

(Filed Jan. 11, 1995)

JOSEPH W. SMOLLEN, III,

Plaintiff-Appellant,

versus

UNITED STATES OF AMERICA,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Texas

Before DUHÉ, WIENER, and STEWART, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was taken under submission on the briefs on file.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

IT IS FURTHER ORDERED that plaintiff-appellant pay to defendant-appellee the costs on appeal to be taxed by the Clerk of this Court.

January 11, 1995

ISSUED AS MANDATE:

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JOSEPH W. SMOLLEN, III., Plaintiff,	§	CIVIL ACTION NO. H-92-1232
VS.	§	
UNITED STATES OF AMERICA, Defendant.	§	

FINAL JUDGMENT

Based upon the Findings of Fact and Conclusions of Law (Docket Entry #26) entered by this Court on November 30, 1993, the Court finds it appropriate to enter a Final Judgment in the above-referenced action for declaratory relief.

Accordingly, it is

ORDERED, ADJUDGED and DECREED that Plaintiff Joseph W. Smollen was not acting within the course and scope of his employment at the time of the automobile/pedestrian accident that occurred on May 2, 1990.

THIS IS A FINAL JUDGMENT.

The Clerk shall enter this Order and provide a true copy to all parties.

Signed this 13th day of December, 1993.

/s/ John D. Rainey
JOHN D. RAINEY
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JOSEPH W. SMOLLEN, III.,	§	
Plaintiff,	§	C.A. NO.
	§	H-92-1232
V.	§	
UNITED STATES OF AMERICA,	§	
	§	
Defendant.	§	
	§	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled action was tried before the Court on April 1, 1993.

The Court now makes the following findings of fact and conclusions of law.

I.

FINDINGS OF FACT

1. Plaintiff Joseph W. Smollen, III ("Smollen") brought this action under 28 U.S.C. § 2679 (d)(3), which provides that in the event that the Attorney General has refused to certify that a federal employee was acting in the scope of his employment at the time of an incident out of which a claim arose, the employee may petition the court to find and certify that the employee was acting within the scope of his office or employment.

2. Smollen is a Systems Engineer at the Strategic Petroleum Reserve Management Office, Department of

Energy, New Orleans, Louisiana ("DOE") and was so employed in May, 1990.

3. Smollen is an expert in systems engineering, with special expertise in modern civil, mechanical, electrical, and petroleum engineering design concepts.

4. In 1990, Smollen's supervisor was Mr. Ernest E. Chapple, Jr., the head of the Analysis and Planning Division, Strategic Petroleum Reserve, DOE.

5. In 1990, the DOE was looking for a better method for quantifying the amount of gas in oil under high pressure (hereinafter referred to as the "gas-in-oil project").

6. On May 1, 1990, Smollen was authorized by DOE to travel to Houston, Texas to review and oversee crude oil testing at Southern Petroleum Labs.

7. Arrangements for Smollen's air travel, lodging and a rental car were made by and reimbursed by DOE.

8. Smollen also received a per diem allowance for meals and incidental expenses.

9. Smollen arrived in Houston around 4:00 p.m. on May 1, 1990, rented a car and drove directly to the Southern Petroleum Lab's facility.

10. Smollen remained at Southern Labs for $2^1/_2$ to 3 hours monitoring tests and then drove to his hotel on the 610 Loop in Houston, Texas.

11. Smollen then contacted his brother-in-law, Frank Newman, to invite him to dinner; however, Mr. Newman did not want to drive to Houston and requested that Smollen come to his home in League City, Texas instead.

12. Newman lived some 25 miles from the hotel where Smollen was staying.

13. It was Smollen's usual practice to contact Newman when Smollen was in town.

14. Smollen went to Newman's home for dinner, arriving there between 7:15 and 7:30 p.m.

15. The dinner engagement with Newman was not pre-planned by Smollen in that he had not contacted Newman prior to arriving in Houston.

16. While visiting Newman's home, Smollen ate dinner, watched TV, had one drink before dinner and another drink after dinner, talked about the gas-in-oil project, as well as recipes, and other family and social matters.

17. It was Smollen and Newman's practice to talk about their work when they got together.

18. Smollen testified that he took notes while he and Newman were discussing the gas-in-oil project and that he reviewed the notes approximately two weeks before the trial of this matter; however, the "notes" were not produced at trial.

19. When Smollen left his brother-in-law's home around midnight, he took an alcoholic drink with him to consume after he arrived at his hotel.

20. Smollen was involved in an automobile/pedestrian accident around 12:30 a.m. Smollen was driving the rental car provided by DOE at the time of the collision.

21. Smollen's discussion of the gas-in-oil project with his brother-in-law was without the knowledge or authorization of Smollen's supervisor, Mr. Chapple.

22. As a grade 14 systems engineer, Smollen had the general authority to contact key officials and top engineering and scientific personnel of other agencies, state and local governments, private industry, universities and other private groups.

23. Newman did not fit into any of the above-described categories.

24. Newman has a degree in industrial engineering but holds no professional engineering licenses.

25. Newman specializes in time and motion studies.

26. Newman has never worked in the petrochemical industry and has no knowledge, training or experience that could be of assistance to DOE on the gas-in-oil project.

27. Newman had never done any consulting work outside his employment with NASA.

28. Although Smollen testified that at the meeting with Newman he discussed technical, organization and presentational issues related to the gas-in-oil project, Newman described Smollen's discussion as "rambling" because he did not understand what Smollen was talking about.

29. Smollen was an expert in making presentations on technical and nontechnical matters having made over one hundred presentations to widely varied audiences.

30. Newman testified that Smollen showed him some charts and graphs but that he did not understand them.

31. Newman testified that his main recommendation to Smollen was: "why don't you put down your problem and say why it is a problem".

32. DOE had a contract with a private company to provide technical support services to DOE personnel on DOE projects. This contractor was available to assist Smollen with any organizational or presentational concerns that he may have had on the gas-in-oil project. Smollen used this contractor routinely and, in fact, used the contractor to prepare the final report on the project.

33. Smollen's job description did not give him an unlimited right to make personal contacts. There should at least be a reasonable expectation that a proposed personal contact would meet or accomplish one of the stated purposes. (See Plaintiff's Exhibit 2).

34. On the evening in question Smollen could not have had any reasonable expectation that his contact and consultation with his brother-in-law Frank Newman would have provided him with any advice or information that would have assisted him in solving any problem or matter involving DOE, including the gas-in-oil project.

35. The preponderance of the evidence supports the conclusion that Smollen's get-together with his brother-in-law was for his own, personal purposes, and not to further the purpose of carrying out DOE's business.

II.

CONCLUSIONS OF LAW

Based upon the prior findings of fact, the Court makes the following conclusions of law:

1. The Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1346(b) and 2679(d)(3).

2. To determine whether Smollen was acting within the course and scope of his employment with the DOE at the time of the automobile pedestrian accident on May 2, 1990, Texas law of respondeat superior is applied. *Marcum v. United States*, 621 F.2d 142 (5th Cir. 1980); *Bettis v. United States*, 635 F.2d 1144, 1147 (5th Cir. 1981).

3. For an employee to establish that he was acting within the scope of his employment, he must show that the act was:

a. within the general authority given him;

b. in furtherance of his employer's business; and,

c. for the accomplishment of the object for which the employee was employed. *Leadon v. Kimbrough Bros. Lumber Co.*, 484 S.W. 2d 567, 569 (Tex. 1972); *Robertson Tank Lines, Inc. v. Van Cleave*, 468 S.W.2d 354, 357 (Tex. 1971).

4. On May 2, 1990, at the time of the automobile/pedestrian accident, Smollen was not acting within the course and scope of his employment. *Drooker v. Saeilo Motors*, 756 S.W.2d 394 (Tex.App. – Houston [1st Dist.] 1988, writ denied).

5. Any conclusion of law deemed to be a finding of fact is hereby adopted as such.

The Clerk will enter this Order and provide all parties with a true copy.

Signed this 30th day of November, 1993.

/s/ John D. Rainey
JOHN D. RAINEY
UNITED STATES
DISTRICT JUDGE

(2)

No. 94-1509

Supreme Court, U.S.
FILED
MAY 15 1995
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1994

JOSEPH W. SMOLLEN, III, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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13p

QUESTIONS PRESENTED

1. Whether federal common law, rather than state law, governs the determination whether a federal employee was acting "within the scope of his office or employment" for purposes of certification under the Westfall Act, 28 U.S.C. 2679(b) and (d).

2. Whether, under Texas law, petitioner was acting within the scope of his federal employment at the time of his automobile accident.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is unpublished, but the decision is noted at 46 F.3d 65 (Table). The opinion of the district court (Pet. App. 16a-22a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 14a) was entered on January 11, 1995. The petition for a writ of certiorari was filed on March 13, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Federal Employees Liability Reform and Tort Compensation Act of 1988 (commonly known as the Westfall Act), Pub. L. No. 100-694, §§ 5-6, 102 Stat. 4564-4565, which amended the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 1402(b), 2401(b), 2671-2680 (1988 & Supp. V 1993), was passed in response to *Westfall* v. *Erwin*, 484 U.S. 292 (1988), in which the Court declined to recognize a rule of absolute immunity for torts committed by federal employees within the scope of their employment. *United States* v. *Smith*, 499 U.S. 160, 163 (1991). The Westfall Act changes the result in *Westfall* v. *Erwin* by providing that suit against the United States under the FTCA is the exclusive remedy for certain wrongful or negligent acts of federal employees committed within the "scope of * * * office or employment." *Smith*, 499 U.S. at 163 & n.3. The Act may be invoked through a certification by the Attorney General (or her designee) that the employee was acting within the scope of his or her employment. 28 U.S.C. 2679(d).[1] If such a certification is made, the suit is "deemed to be an action or proceeding brought against the United States" under the FTCA, and "the United States [is] substituted as the party defendant." 28 U.S.C. 2679(d)(1) and (2). If the Attorney General declines to issue a certification, the employee may "at any time before trial petition the court to find and certify that

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[1] The Attorney General has delegated certification authority to the Assistant Attorney General in charge of the Civil Division and to the United States Attorneys. See 28 C.F.R. 15.3 and Appendix. For simplicity, however, we refer to certification "by the Attorney General."

the employee was acting within the scope of his office or employment." 28 U.S.C. 2679(d)(3).

2. Petitioner, an employee of the Strategic Petroleum Reserve Management Office of the Department of Energy (DOE) in New Orleans, Louisiana, was authorized to travel to Houston, Texas, on official business. Upon his arrival in Houston, petitioner rented a car, as authorized by his travel papers, and drove to Southern Petroleum Labs to review and oversee certain crude oil lab tests in an effort to devise a better way to measure the amount of gas in oil under high pressure. Several hours later, petitioner drove to his hotel. From there, petitioner called his brother-in-law, who invited petitioner to his home for dinner. Petitioner drove approximately 25 miles to his brother-in-law's house, arriving at about 7:30 p.m. While there, petitioner ate dinner, watched television, had two drinks, and discussed the gas-in-oil project, family matters, and recipes. On the way back to his hotel, in the early morning hours, petitioner was involved in an automobile accident with a pedestrian. Pet. App. 2a-3a, 17a. Petitioner removed the ensuing state wrongful death action to the United States District Court for the Southern District of Texas.

3. After the Attorney General refused to certify that petitioner was acting within the scope of his employment at the time of the accident, petitioner filed a complaint for declaratory relief in the district court, seeking certification by the court under 28 U.S.C. 2679(d)(3).[2] The district court declined to

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[2] Section 2679(d)(3) provides that the federal employee may request a judicial certification through a petition filed in the court that has jurisdiction over the underlying action. Although

provide certification, concluding that petitioner was acting outside the scope of employment. Pet. App. 2a, 3a-4a.

Applying Texas law, the court held that petitioner could prevail only by proving that, at the time of the accident, he was acting (1) pursuant to the general authority given him, (2) in furtherance of his employer's business, and (3) to accomplish the object for which he was employed. Pet. App. 21a, citing *Leadon* v. *Kimbrough Bros. Lumber Co.*, 484 S.W.2d 567, 569 (Tex. 1972). The court found that during petitioner's visit to his brother-in-law's home the two men discussed petitioner's gas-in-oil project, and that petitioner took notes of their conversation. Pet. App. 18a. It also found, however, that the discussion took place without the knowledge or authorization of petitioner's supervisor, and that petitioner's brother-in-law "ha[d] no knowledge, training, or experience that could be of assistance to DOE on the gas-in-oil project," did not understand the substance of petitioner's technological issues, and suggested only that, for purposes of his presentation, petitioner "put down [his] problem and say why it is a problem." *Id.* at 19a-20a. Taking into consideration the dinner, drinks, television, and conversations regarding recipes and family matters, the court concluded that "[petitioner's] get-together with his brother-in-law was for his own, personal purposes, and not to further the purposes of carrying out DOE's business." *Id.* at 20a.

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petitioner in this case did not follow that procedure, the propriety of his independent action for declaratory relief was not disputed in or decided by the courts below.

4. The court of appeals affirmed, in a per curiam opinion. Pet. App. 1a-13a. The court declined to address petitioner's argument that the district court erred in applying state law, rather than federal common law, to the scope-of-employment determination, since petitioner did not raise that argument before the district court, and no showing of manifest injustice warranted consideration of the argument for the first time on appeal. *Id.* at 4a-6a. Turning to those arguments that petitioner had preserved, the court rejected both petitioner's claim that the district court's fact-findings were clearly erroneous, and his contention that the district court misapplied Texas law. *Id.* at 6a-11a.

ARGUMENT

1. Petitioner argues (Pet. 10-17) that federal common law, rather than state law, applies to scope-of-employment determinations made under the Westfall Act. Because, as petitioner concedes (Pet. 21-22), he failed to raise that issue before the district court, the court of appeals correctly declined to address it, *Singleton* v. *Wulff*, 428 U.S. 106, 120 (1976), and the claim is not properly presented to this Court for resolution in the first instance, *Patrick* v. *Burget*, 486 U.S. 94, 99 n.5 (1988); *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 697 (1984). Although the Court will, in exceptional cases, review questions not pressed or passed upon below, *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976), this is not an exceptional case.[3]

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[3] Contrary to petitioner's view, Pet. 21-22, the fact that federal courts applying different States' standards may reach different conclusions on similar facts does not constitute a "manifest injustice." Courts applying federal statutes frequently borrow rules of decision from state law. *E.g.*, *Wilson*

The courts of appeals that have ruled on the issue have, in all events, uniformly held that the scope-of-employment determination under the Westfall Act is to be made under the law of the State in which the alleged incident occurred. See *Nasuti* v. *Scannell*, 906 F.2d 802, 805 n.3 (1st Cir. 1990); *Schrob* v. *Catterson*, 967 F.2d 929, 934 (3d Cir. 1992); *Jamison* v. *Wiley*, 14 F.3d 222, 237 (4th Cir. 1994); *Arbour* v. *Jenkins*, 903 F.2d 416, 421-422 (6th Cir. 1990); *Forrest City Mach. Works, Inc.* v. *United States*, 953 F.2d 1086, 1088 n.5 (8th Cir. 1992); *S.J. & W. Ranch, Inc.* v. *Lehtinen*, 913 F.2d 1538, 1542 (1990), amended, 924 F.2d 1555 (11th Cir.), cert. denied, 502 U.S. 813 (1991); cf. *Cronin* v. *Hertz Corp.*, 818 F.2d 1064, 1065 (2d Cir. 1987) (scope of employment under Federal Drivers Act governed by state law).[4] Application of state law

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v. *Garcia*, 471 U.S. 261, 279 (1985) (borrowing state limitations periods to govern timeliness of actions under 42 U.S.C. 1983); *Maryland* v. *Louisiana*, 451 U.S. 725, 751-752 (1981) (borrowing state law rules under Outer Continental Shelf Lands Act); cf. *United States* v. *Kimbell Foods, Inc.*, 440 U.S. 715, 740 (1979) (borrowing state law to determine, under federal common law, the relative priority of liens arising from government lending programs).

[4] The contrary holding in *Garcia* v. *United States*, 799 F. Supp. 674 (W.D. Tex. 1992), aff'd, 22 F.3d 609, reh'g en banc granted, 22 F.3d 612 (5th Cir. 1994), provides no basis for certiorari. The district court's determination in *Garcia* that, under federal common law, the employee was acting within the scope of his federal employment was affirmed by the court of appeals solely on the basis of the panel's holding that the Attorney General's certification was not subject to judicial review. 22 F.3d at 611. The court of appeals has since accepted a petition for en banc review, and its disposition of the case will likely be controlled by this Court's decision respecting the reviewability of certifications made by the

to the scope-of-employment determination under the Westfall Act is fully consistent with the application, under the FTCA, of the substantive law of the place "where the act or omission occurred." See 28 U.S.C. 1346(b).[5]

2. Petitioner argues in the alternative (Pet. 18) that, "even assuming that state law is the applicable law, the court of appeals' decision is * * * contrary to settled Texas jurisprudence." The question whether lower federal courts have erred in their application of state law is not ordinarily a matter that warrants this Court's review. *Haring* v. *Prosise*, 462 U.S. 306, 314 n.8 (1983). Moreover, the lower courts did not err in their application of Texas law to the facts of this case.

In Texas, "the general rule [is] that use of public streets or highways in going to or returning from one's place of employment is not within the scope of one's employment." *J & C Drilling Co.* v. *Salaiz*, 866

Attorney General in *Gutierrez De Martinez* v. *Lamagno*, No. 94-167 (argued Mar. 22, 1995). Although the district court's holding in *Garcia* regarding the application of federal common law conflicts with the unreported decision of the district court in this case, the conflict between two district courts in the same circuit is appropriately left for resolution by the court of appeals for that circuit.

[5] The legislative history of the Westfall Act demonstrates Congress's intent that scope-of-employment determinations under the Act be subject to the same principles that determine whether the United States is liable for employee acts under the FTCA—*i.e.*, the *respondeat superior* principles of the State where the acts occurred. See H.R. Rep. No. 700, 100th Cong., 2d Sess. 5-6 (1988). Federal law and policy may play important roles insofar as they define the nature of the responsibilities of the federal officer or employee. See, *e.g.*, *Platis* v. *United States*, 409 F.2d 1009, 1011 (10th Cir. 1969).

S.W.2d 632, 636 (Tex. Ct. App. 1993), citing *American General Ins. Co.* v. *Coleman*, 303 S.W.2d 370, 374 (Tex. 1957); see also *Chevron, U.S.A., Inc.* v. *Lee*, 847 S.W.2d 354, 355 (Tex. Ct. App. 1993). Although Texas law recognizes an exception to that principle when an accident occurs while the employee is serving on a special mission or assignment for his employer, to qualify for the special mission exception the employee must be both subject to his employer's control and acting in furtherance of his employer's business at the time of the accident. See *Chevron, U.S.A., Inc.* v. *Lee*, 847 S.W.2d at 356.

Here, the district court found that "[t]he preponderance of the evidence support[ed] the conclusion that [petitioner's visit to his brother-in-law's home] was for his own, personal purposes, and not to further the purpose of carrying out DOE's business." Pet. App. 20a. Particularly in light of the events that transpired during that visit (*i.e.*, dinner, drinks, television, and conversation regarding family matters and recipes), the district court's finding that the visit served petitioner's "personal purposes" cannot be set aside as clearly erroneous.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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